

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**AMY HOGAN,
Grievant,**

v.

DOCKET NO. 2015-1306-KanED

**KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Amy Hogan, filed a grievance against her employer, the Kanawha County Board of Education, on May 20, 2015. The statement of grievance reads: "Grievant asserts that her summer position at Stonewall Jackson Middle School being assigned to another emmployee [sic] [is] in violation of W. Va. Code 18-5-39." As relief Grievant sought, "instatement to her summer position, compensation for lost wages with interest and all benefits."

A conference was held at level one on June 15, 2015, and a level one decision denying the grievance was issued on June 30, 2015. Grievant appealed to level two on July 14, 2015, and a mediation session was held on October 1, 2015. Grievant appealed to level three on October 12, 2015, and a level three hearing was held before Chief Administrative Law Judge Billie Thacker Catlett on January 11, 2016. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by James W. Withrow, Esquire. This matter became mature for decision on February 12, 2016, on receipt of the last of the

parties' written Proposed Findings of Fact and Conclusions of Law, and was then reassigned to the undersigned Administrative Law Judge for administrative reasons.

Synopsis

As a result of a reduction in force of four summer Cook positions, Respondent allowed the three Cooks at Grievant's school who had held the summer Cook positions the preceding summer to choose which position they wanted at that same school for the summer of 2015, by seniority. This resulted in Grievant being displaced from the full-time position she had held for the previous three summers into a half-time position, while the more senior Cook who had worked at the same school as Grievant the previous summer in a half-time position was placed in what had been Grievant's full-time position. The only person truly affected by the reduction in force who held sufficient seniority to be re-employed in a different position was placed in the summer Cook position at a different school from Grievant's, in a position previously held by the least senior summer Cook, who was reduced in force due to her seniority. This chain of events had no impact on Grievant's school or position. Respondent's decision to let the summer Cooks at Grievant's school choose which position they preferred at the school based on seniority is not supported by the statute addressing a reduction in force for summer employees. Grievant should have been allowed to remain in the full-time Cook position she held during the summer of 2014.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Kanawha County Board of Education ("KBOE") as a full-time Cook since 2002.

2. Grievant was also employed in a full-time Cook position by KBOE during the summers of 2012, 2013, and 2014, at Stonewall Jackson Middle School in the summer food program, and as a Cook during the summer for other years, so that her total summer seniority was eight years.

3. During the summer of 2014, Glenda Johnson was employed by KBOE as a half-time Cook at Stonewall Jackson Middle School. Ms. Johnson's contract states that she was employed as a .50 Cook, and the seniority list indicates that a half-time Cook position had been posted for the summer of 2014. However, Ms. Johnson asked Diane Miller, Head of Child Nutrition, if she could work as a full-time Cook during the summer of 2014, and Ms. Miller told her she could do so. Ms. Johnson then worked as a full-time Cook at Stonewall Jackson Middle School for the remainder of the summer, and was paid for eight hours a day.

4. Prior to the summer of 2015, KBOE determined that it would need to eliminate four Cook positions for the summer food program in 2015. Three of the four positions which were to be eliminated were half-time Cook positions, and had been held the previous summer by Cooks whose seniority was insufficient to allow them to retain any position, as there were no summer Cooks with less seniority than they had. The fourth employee, Paula Smith, had 15 years of summer seniority. The person who had been employed as a Cook the previous summer at Sharon Dawes Elementary School had the

least seniority of any other remaining summer Cooks, and was reduced in force, and Ms. Smith was placed in her position for the summer of 2015.

5. Because of the reduction in the number of Cook positions for the summer of 2015, KBOE personnel evaluated the seniority of all personnel. There were three Cook positions at Stonewall Jackson Middle School for both the summer of 2014 and the summer of 2015. During the summer of 2015 there were two full-time positions and one half-time positions, just as there originally were during the summer of 2014, before Ms. Johnson was allowed to work full-time. KBOE allowed the three Cooks at Stonewall Jackson Middle School during the summer of 2014, to choose which Cook position they wanted at Stonewall Jackson Middle School for the summer of 2015, based on their summer seniority. The employee who had been the Head Cook during the summer of 2014, had the most seniority of the three employees, and chose to retain the Head Cook position in the summer of 2015. Because Ms. Johnson had more summer seniority than Grievant, KBOE allowed Ms. Johnson to choose which of the remaining two positions she preferred at Stonewall Jackson Middle School for the summer of 2015, and she chose the full-time position which Grievant had held the previous summer. Grievant was placed in the half-time position for the summer of 2015.

6. After KBOE decided to place Ms. Johnson in the full-time Cook position at Stonewall Jackson Middle School, KBOE added a half-time Cook position at Elk Elementary Center, and Ms. Johnson bid into that position. Ms. Johnson's full-time Cook position at Stonewall Jackson Middle School was then posted, and Ms. Smith bid on that position, and was selected as she was the most senior applicant.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The issue presented is whether Respondent properly implemented a reduction in force for the summer of 2015, as it relates to the three Cooks at Stonewall Jackson Middle School. W. VA. CODE § 18-5-39 provides, in pertinent part, as follows:

(f) Notwithstanding any other provision of the code to the contrary, the county board may employ school service personnel to perform any related duties outside the regular school term as defined in section eight [18A-4-8], article four, chapter eighteen-a of this code. An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer. If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b [18A-4-8b], article four, chapter eighteen-a of this code.

* * *

(g) If a county board reduces in force the number of employees to be employed in a particular summer program or classification from the number employed in that position in previous summers, the reductions in force and priority in reemployment to that summer position shall be based upon the length of service time in the particular summer program or classification.

This CODE Section “provides that any employee who accepts a summer assignment is entitled to the same assignment the following year if it exists. [citations omitted]” *Lemley v. Wood County Bd. of Educ.*, Docket No. 99-54-198 (Sept. 9, 1999). ““Once a board of education employee is properly placed in a particular summer position, seniority rights are established for the employee to return to the position during any succeeding years[. . .]” *Kennedy v. Marion County Bd. of Educ.*, Docket No. 91-24-427 (Dec. 30, 1991).” *Panrell v. Monongalia County Bd. of Educ.*, Docket No. 96-30-408 (April 25, 1997). “The seniority granted to regularly employed workers and the “seniority” granted to summer employees in their positions is controlled by separate statutes and is not meant to be commingled. W. VA. CODE §§ 18-5-39; 18A-4-8b; & 18A-4-8g. *Bowmen [sic] v. Kanawha County Bd. of Educ.*, Docket No. 99-20-039B (Mar. 31, 1999).” *Beane v. Kanawha County Bd. of Educ.*, Docket No. 03-20-008 (April 30, 2003).

“The Grievance Board has also determined that some flexibility exists in the definition of ‘same assignment.’ It is enough that there is consistency in the type of work being performed, even if the location and exact nature of the work is somewhat different. By way of example, bus operators’ positions remain the same even though the routes change from summer to summer, school lunch programs at different schools are part of one overall summer lunch program, and a summer transportation program employing aides remain the same program even though the routes change from summer to summer. *Lilly v. Fayette County Bd. of Educ.*, Docket No. 96-10-481 (Sept. 15, 1997); *Lilly v. Fayette County Bd. of Educ.*, Docket No. 99-10-435 (Mar. 17, 2000); *Williams v. Kanawha County Bd. of Educ.*, Docket No. 0[1]-20-058 (May 10, 2001); *Costello v. Monongalia County Bd.*

of Educ., Docket No. 01-30-016 (June 21, 2001).” *Eisentrout v. Preston County Bd. of Educ.*, Docket No. 2010-0022-PreED (Apr. 16, 2010).

The evidence in this case referred only to the summer food program for all the Cook positions across the county, although it is clear that the positions were posted and filled by school. The record reflects that four Cook positions were cut for the summer food program for 2015. The reduction in force was in the Cook classification. KBOE was required to implement the reduction in force based on length of service in the classification, which it did. Three of the four positions which were deemed not needed in the summer of 2015 were held by employees who were at the bottom of the summer seniority list. Accordingly, these three employees were reduced in force, and were not re-employed in any Cook position during the summer of 2015.

The fourth position which was eliminated for the summer of 2015, was held by a Cook with sufficient seniority that she had acquired the statutory right to priority in re-employment “based upon the length of service time in the particular . . . classification.” Grievant argues that this Cook, Ms. Smith, was re-employed based on seniority in the position at Sharon Dawes Elementary School when the person who had previously held that position was reduced in force due to her lack of seniority, and no other action should have been taken by Respondent. Respondent argues that it was required to look at the seniority of all Cooks, which it was, at least initially.

However, after all the positions and persons affected by the reduction in force were determined, displaced and placed, Respondent then for some unexplained reason, continued to review seniority by school, so that, in the circumstances here, KBOE had three summer Cook positions available at Stonewall Jackson Middle School during the

summer of 2014, and three in the summer of 2015, so it offered the three positions only to the same three Cooks who had worked at that school in the summer of 2014, in order of seniority. The undersigned is at a loss as to how KBOE arrived at the conclusion that the applicable statute required this. After Respondent placed Ms. Smith in the position at Sharon Dawes Elementary School, displacing and releasing the least senior summer Cook, there was nothing more to be done, and if any other action were required, there is certainly no statutory support for shuffling personnel only by school.¹

The undersigned suspects that when Respondent's personnel were reviewing countywide seniority and comparing 2014 to 2015, someone noticed that all the Cooks at Stonewall Jackson Middle School worked full-time during the summer of 2014, but that there were only two full-time Cook positions for the summer of 2015, while the third position was a half-time position, and it was that discovery that led to the decision to allow the three Cooks to choose their positions based on seniority. This situation, however, had nothing to do with the reduction in force. The three Cooks at Stonewall Jackson Middle School should have been returned to the same positions they held the previous summer, meaning Grievant should have been returned to her full-time position and Ms. Johnson returned to her half-time position. There is no evidence to suggest that Ms. Johnson's summer Cook position at Stonewall Jackson Middle School was ever officially a full-time position which had been properly posted and filled, but was always, officially, a half-time position.

The following Conclusions of Law support the Decision reached.

¹ Neither party argued that this act of placing Ms. Smith in the Sharon Dawes position was incorrect, so the undersigned will not explore that issue further.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. W. VA. CODE § 18-5-39(f) "provides that any employee who accepts a summer assignment is entitled to the same assignment the following year if it exists. [citations omitted]" *Lemley v. Wood County Bd. of Educ.*, Docket No. 99-54-198 (Sept. 9, 1999). "Once a board of education employee is properly placed in a particular summer position, seniority rights are established for the employee to return to the position during any succeeding years[. . .]" *Kennedy v. Marion County Bd. of Educ.*, Docket No. 91-24-427 (Dec. 30, 1991)." *Panrell v. Monongalia County Bd. of Educ.*, Docket No. 96-30-408 (April 25, 1997).

3. W. VA. CODE § 18-5-39(f) provides that "[i]f a county board reduces in force the number of employees to be employed in a particular summer program or classification from the number employed in that position in previous summers, the reductions in force and priority in reemployment to that summer position shall be based upon the length of service time in the particular summer program or classification."

4. Grievant demonstrated that her position was not affected by the reduction in force, and she should have retained the full-time Cook position at Stonewall Jackson Middle School during the summer of 2015, which she held during the summer of 2014.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to adjust its records to reflect that Grievant held the same full-time Cook position at Stonewall Jackson Middle School during the summer of 2015 that she held in the summer of 2014, and to pay her backpay in the amount of the difference in pay between what she would have earned as a full-time Cook during the summer of 2015, and what she earned as a half-time Cook during the summer of 2015, plus interest at the statutory rate, and to award her any and all benefits she would have received as a full-time Cook which she did not receive as a half-time Cook, if any.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: March 15 , 2016

BRENDA L. GOULD
Administrative Law Judge